NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRENT THOMPSON; SYLVIA THOMPSON, Trustee Under Declaration of Trust, Plaintiffs - Appellants, v. THOMAS CANTWELL; ROSELYN N. CANTWELL, aka Roselyn N. Martin; RICHARD L. HANDLER; MARGARET M. HANDLER; JESSE L. ALEXANDER; NANCY W. ALEXANDER; THOMAS R. BURT, Defendants - Appellees.	No. 04-36157 D.C. No. CV-01-03108-HO MEMORANDUM*
BRENT THOMPSON; SYLVIA THOMPSON, Trustee Under Declaration of Trust, Plaintiffs - Appellants, v. ROSELYN N. CANTWELL, aka Roselyn N. Martin,	No. 05-35969 D.C. No. CV-01-03108-HO

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Defendant,

and

RICHARD L. HANDLER; MARGARET M. HANDLER; JESSE L. ALEXANDER; NANCY W. ALEXANDER; THOMAS R. BURT,

Defendants - Appellees.

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, Chief District Judge, Presiding

Argued and Submitted November 13, 2006
Portland, Oregon

Before: FERGUSON, O'SCANNLAIN and FISHER, Circuit Judges.

Brent Thompson, on behalf of the Thompson Family Trust (collectively "Thompson"), purchased property in Medford, Oregon, from defendants subject to a preexisting note and trust deed and pursuant to an agreement that defendants would pay off the debt. After defendants failed to pay, Thompson paid off the debt and took an assignment of the trust deed and note. Thompson now appeals the district court's entry of summary judgment against him, arguing that the district court improperly found a merger because a dispute of fact remained regarding whether he received a discount on the property's purchase price in consideration of it being taken subject to the preexisting debt. Thompson also argues that the

district court erred by failing to apply the anti-merger clause in the deed of trust, by finding that the debt had been extinguished through payment prior to the assignment and by awarding attorney's fees. Reviewing de novo, *see 'Ilio'ulaokalan Coal. v. Rumsfeld*, 464 F.3d 1083, 1093-94 (9th Cir. 2006); *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1059-60 (9th Cir. 2006), we hold that there was a merger under Oregon law and that because the merger did not void the contract, note or deed of trust, the district court properly awarded fees. Accordingly, we affirm.

In *Baxter v. Redevco, Inc.*, 566 P.2d 501, 504 (Or. 1977), the Oregon Supreme Court held that when a real estate purchaser buys property subject to a preexisting deed of trust, "his bargain include[s] as a part of the price the amount of the note and [deed of trust]." *Id*. Moreover, "'[w]here such a grantee takes an assignment of the mortgage, as a general rule the debt secured by the mortgage is held to be extinguished and personal liability on it cannot be enforced.'" *Id.* (quoting George E. Osborne, Handbook on the Law of Mortgages § 274, at 555 (2d ed. 1970)). Such merger occurs "'without regard to [the grantee's] intention.'" *Id.* (quoting Osborne § 274, at 551). We reject Thompson's argument that the existence of a discount is a factual issue to be decided by the factfinder if it is in dispute. Under *Baxter*, the grantee's purchase of the mortgage results in a merger

as a matter of law, without regard to the intent of the grantee and without regard to the value of the property. *Id.* at 504.

Thompson argues that *Baxter*'s calculations of the price of the property as compared to the magnitude of the debt that encumbered it demonstrate that discount was an issue of fact. *See id.* at 504 n.2 (noting that "the plaintiff did take into consideration the $6,000 note and second trust deed when he computed the amount that he would pay Rosbach for the property"). We disagree. In doing so the court was merely illustrating that there had been a discount. The court did not suggest that the existence of a discount is an issue of fact that must be proven as a prerequisite to merger.

The anti-merger clause in the deed of trust did not preclude the merger. Even if we were to assume that the clause covered Thompson, the clause nonetheless would merely be evidence of Thompson's intent regarding merger. *Baxter*'s conclusion that intent is irrelevant in a case such as this one thus controls. *See id.* at 504.

Finally, we agree with the district court that the merger did not prevent Thompson from enforcing the attorney's fees clauses in the sale agreement, deed of trust and promissory note. Thus, by operation of Or. Rev. Stat. § 20.096(1), defendants could seek fees under the clauses. As stated in *Baxter*, the effect of

merger is that "'the debt secured by the mortgage is held to be extinguished and personal liability on it cannot be enforced.'" 566 P.2d at 504 (quoting Osborne § 274, at 555). Furthermore, "if the grantee paid the amount of the debt for the assignment, the mortgagor should be able to insist that it constituted payment of the debt rather than purchase of it." *Id*. Thus the effect of merger is that the debt is discharged, not – as Thompson contends – that the underlying contracts are deemed void or rescinded. The attorney's fees clauses accordingly survived the merger.

AFFIRMED.